Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MARK STEVEN CORRINET, Petitioner,

v.

THE UNITED NATIONS, HON. KOFI ANNAN, SECRETARY GENERAL OF THE UNITED NATIONS, AND RON IRWIN GINNS aka ARLEIGH GAINES, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petitioner, Mark Steven Corrinet, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit filed August 28, 1997 in this case.

QUESTIONS PRESENTED

1) Whether there is any judicial mechanism to enforce the mandatory duty of Section 20 of the Convention on Privileges and Immunities, 1 U.N.T.S. 15 (1946), 21 U.S.T. 1418 (1970), T.I.A.S. No. 6900.

2) Whether the Secretary-General of the United Nations has a mandatory duty to waive the United Nations Convention's grant of immunity where the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.

3) Whether the Secretary-General of the United Nations has a mandatory duty to provide an appropriate mode of settlement under Article 8, Section 29 of the Convention on Privileges and Immunities, 1 U.N.T.S. 15 (1946), 21 U.S.T. 1418 (1970), T.I.A.S. No. 6900 where he has chosen not to waive the immunity of the official against whom a dispute exists.

4) Whether the United Nations' immunity from every form of legal process is lost because of the "commercial activity exception" embodied in 28 U.S.C. Section 1602 of the Foreign Sovereign Immunities Act (FSIA).

5) Whether the District Court should have sustained petitioner's objection to the Statement of Interest filed by the United States on April 11, 1996.

6) Whether the District Court should have entered a default judgement in favor of petitioner based on the United Nations' failure to file a proper response.

7) Whether the District Court should have permitted a hearing on this matter.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997
NO.

OPINION OR JUDGEMENT BELOW

The unpublished opinion of the United States Court of Appeals for the Ninth Circuit, *Corrinet v. United Nations*. A copy of the decision is attached as Exhibit A to this petition. Further, since the Court of Appeals only issued a summary decision, petitioner has also submitted the District Court's opinion granting the dismissal of complaint as Exhibit B to this petition.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. Section 1254(1), to review the judgement of the United States Court of Appeals for the Ninth Circuit. This petition is being filed within 90 days of the judgement of the Court of Appeals.

CONSTITUTIONAL, PROVISIONS INVOLVED

There are no specific United States Constitution provisions involved. This petition seeks interpretation of treaty provisions between the United States of America and the United Nations.

This petition concerns interpretation of Article 5, Section 20 of the 1946 General Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15 (1946), 21 U.S.T. 1418 (1970), T.I.A.S. No. 6900 which states:

> "The Secretary General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. . ."

Further, petitioner seeks interpretation of Article 8, Section 29 of the same treaty which states:

> "The United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; (b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General."

Finally, the petitioner seeks the Court's interpretation of the Foreign Sovereign Immunities Act, 28 U.S.C. Section 1605(a)(2):

> "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case in which the action is based upon a commercial activity carried on in the United States foreign state. . ."

as it applies to petitioner's business transactions with the United Nations.

None of these treaty sections have been interpreted by the Supreme Court before in relation to a suit by a United States citizen against another United States citizen working in the United States with United States companies who has been given a shield of diplomatic immunity through the United Nations. Because of the growing public concern with the growing abuses of foreign immunities, as this case clearly exemplifies, the problems pose an important series of issues and one of first impression for the Supreme Court of the United States.

STATEMENT OF FACTS

Petitioner, a collector and dealer in United Nations related stamps, covers and historical documents, purchased a collection of rare documents including a set of treaty signature pages from the Interim Agreement signed on June 26, 1945 at the San Francisco

Conference on International Organizations (the birthplace of the United Nations) in mid-1992 with the intention of putting together a project to find a purchaser who would donate the documents to the United Nations during the 50th anniversary celebrations to be held in 1995. (Complaint, paragraph 18.)

The Interim Agreement was one of two documents signed on June 26, 1945 (the other being the United Nations Charter). The Interim Agreement was the operating document of the fledgling United Nations until the formal ratification of the United Nations Charter, which occurred October 24, 1945 ("UN Day"). (Complaint, paragraph 17.)

The Interim Agreement authorized the establishment of the Preparatory Commission of the United Nations, which met in London during 1945, and took on the task of taking the concepts of the Charter and implementing a workable structure for the United Nations.

While the United Nations Charter was stored in the United States Library Archives to this day (appearing only every 25 years in San Francisco and New York for a few weeks), the Interim Agreement disappeared from the historical records soon after the completion of the final work of the Preparatory Commission.

The loss of historical records was endemic during the first decade of the United Nations before procedures were put into effect to prevent officials and delegates from "souvenir hunting" among the United Nations libraries and archives.

With the signature pages in hand, petitioner traveled to New York to discuss with the offices of Under-Secretary-General Joseph Verner Reed (then head of the U.N. 50th Anniversary Committee), a project where at petitioner's sole expense and time he would seek out a willing purchaser to buy the documents. The purchaser would be contractually bound to then donate the documents for tax and publicity advantages through the United Nations Association of San Francisco to the United Nations for ongoing display at the United Nations headquarters in New York (where currently 500,000 visitors tour the facility each year).

Under-Secretary-General Joseph Verner Reed issued a letter to Dr. Laina Farhat, then Executive Director of the UNA-SF whom petitioner had been working through, that stated, "On behalf of the Secretary-General of the United Nations, I would like to confirm that we are most interested in receiving in donation the United States Department Backup copy of the Signature Pages of the United Nations Charter[1], dated June 26, 1945. . ." (Complaint, pages 4-6 and Exhibit C.)

With the assurances and written support of both the United Nations and the UNA-SF in place, petitioner, through a large expenditure of funds and time, was able to track down in addition to the original signature pages a complete set of printer's proofs of the text pages, a complete set of the final text pages from an unsigned copy of the treaty, and finally the original design proof of the binding cover, thus effectively recreating an historical document thought lost for over fifty years.

Unknown to the petitioner, due to a change in the political leadership in Washington, D.C., Under-Secretary-General Joseph Verner Reed was replaced by Under-Secretary-General Gillian Sorenson as head of the United Nations 50th Anniversary Committee early in 1993. She, in turn, retained the services of Mr. Ron Ginns aka Arleigh Gaines sometime in late 1993 as a consultant on a one-year contract for the purposes of assisting the committee in raising funds from U.S. based corporations to be used during the then upcoming 1995 celebrations.

Mr. Ginns and petitioner have both been active, well-known members of the United Nations collector organizations and publications for over ten years. There was a long-standing feud between these individuals for reasons unrelated to this case, and concerning Corrinet's comments on Ginn's opinions as to the value

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1. Throughout 1992 all parties were under the mistaken impression that the signature pages were "back-up copies." It was standard practice prior to the jet age for additional back-up copies of signature pages to be made at treaty signings to avoid the unfortunate situation of the originals being damaged and no replacements being available prior to ratification. Subsequent research in 1993 showed that no back-up copies were made at the 1945 conference and that the signature pages were, in fact, those of the long-lost Interim Agreement.

of stamps and covers.

Due to an unfortunate series of coincidences (any questions even remotely related to the 50th Anniversary celebrations were forwarded to the U.N. 50th Anniversary Committee and other than Under-Secretary-General Gillian Sorenson, respondent Ginns was the only non-clerical individual in the office, which placed him in the position of fielding project questions from outsiders), respondent Ginns wound up answering all inquiries from press and individuals interested in petitioner's project.

Driven by his personal animosity toward Corrinet, Ginns used his United Nations consulting position as a platform for personal attacks against Corrinet. These attacks were made regardless of the resulting consequences to the stated written interests of the United Nations. The complaint states in detail how Ginns deliberately and intentionally, with malice, defamed Corrinet by stating to the Associated Press and members of the rare documents collectors and dealers communities that petitioner was a fraud, that the documents were not authentic, that the project was a tax scam, that neither the UNA-SF nor the United Nations wanted anything to do with the documents, that the documents were near valueless, and that Ginns had to protect the United Nations from "people like Mr. Corrinet." (Complaint, pages 8-9.)

The complaint (page 9) further states that Ginns knew the remarks to be false when made.

Ginns' remarks, made in February 1994, proximately caused petitioner damages by interrupting a potential transaction of the documents, by destroying a potential press release, by injuring Corrinet's process of marketing and promoting his project, and by injuring his reputation. (Complaint, page 10, paragraphs 39 and 40.)

Petitioner, both individually and through counsel, made a series of formal attempts to have United Nations authorities mitigate the damage in time to complete the project in 1995. The United Nations flatly refused to even investigate the matter, contact any named witnesses, or even issue a letter contradicting Mr. Ginns' statements to the press.

Mr. Corrinet's three million dollar project, his reputation, personal assets and countless hours are gone. The public damage caused by Mr. Ginns was so severe that even to date no individual or business will even discuss with Mr. Corrinet a possible outright sale of the documents despite Mr. Corrinet's numerous attempts to mitigate the damage after the 1995 celebrations had passed.

Preceding the filing of the District Court case, Corrinet tried several times to seek a waiver of any immunities granted to Ginns from the Secretary-General of the United Nations. The Secretary-General refused to grant any waivers other than to allow an action to proceed in binding arbitration subject to one major failing. While binding arbitration was an acceptable option to Corrinet, the United Nations flatly refused to grant the accompanying waiver should damages be awarded by the arbitration panel. A paraphrase of their position was basically "trust us." This left Corrinet with only two options: 1) go ahead with the arbitration, allow the trial option to lapse due to the applicable statute of limitations, and then confront the same issue of immunity for a judgement, or (2) proceed with a civil suit. Since either option placed Corrinet in exactly the same position--that of confronting a grant of immunity--Corrinet chose to preserve his civil option while hoping that the United Nations would move ahead as they are required under Article VIII, Section 29, of the U.N. Convention on Privileges and Immunities to make provisions for the appropriate modes of settlement of disputes of a private law character.

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings and Disposition Below

Corrinet has submitted this matter before the United States Supreme Court as an original proceeding under 28 U.S.C. Section 1251(b)(1) and Article 3, Section 2 of the United States Constitution. The Supreme Court denied Corrinet's motion for leave to proceed as an original proceeding, and did not reach the merits of any claims. See, *Corrinet v. Ghali*, 116 S.Ct. 694, 64 U.S.L.W. 2465 (1996).

Corrinet filed a complaint for damages in the United States District Court, Northern District of California.

Petitioner's complaint sought equitable relief by way of specific performance of the affirmative duty of Secretary-General Boutros Boutros Ghali to waive any attendant immunities, pursuant to Section 20 of the Convention on Privileges and Immunities. (Complaint, paragraphs 50-73.) Corrinet had submitted a formal request to the Secretary-General requesting a waiver of immunities. (Complaint, page 16, paragraph 60.) That request was denied. (Complaint, page 16, paragraphs 61-62.)

The complaint further pleaded actions based on the torts of defamation, interference with prospective economic advantage, and breach of written contract, quasi contract, and promissory estoppel. The complaint was filed by plaintiff Mark Steven Corrinet on February 6,1995. Defendants are United Nations, the Honorable Boutros Boutros Ghali, then Secretary-General of the United Nations (now the Honorable Kofi Annan), Gillian Sorenson, Under-Secretary-General of the United Nations, and Ron Irwin Ginns aka Arleigh Gaines, then a contract consultant with the United Nations.

Petitioner's suit against Secretary-General Boutros Boutros Ghali dealt only with the express duty to waive the immunity granted to respondent Ginns under Section 20 of the United Nations Conventions on Privileges and Immunities. (Complaint, paragraphs 50-73.) With the assistance of the United States Mission to the United Nations, then under Ambassador Albright, Corrinet submitted a formal request to the Secretary-General requesting a waiver of immunities for Ginns. (Complaint, page 16, paragraph 60.) That request was improperly denied and done in a manner which violated a reasonable duty to first investigate the claims being made. (Complaint, page 16, paragraphs 61-62.)

Petitioner's complaint alleged and prayed for defamation damages against defendant Ginns based on the false and defamatory statement Ginns made to certain dealers and collectors in fine documents, members of the press, and prospective purchasers of the documents. (Complaint, paragraphs 33-34.) Petitioner's project was to find a purchaser/donor and arrange for the original historical documents to be given to the United Nations permanently, but his attempt failed because defendant Ginns defamed petitioner by stating that petitioner was a fraud, and that his documents were not authentic and were valueless. Petitioner asserts that these statements were

false and that he has been injured by them both in reputation and by being unable to sell his documents.

The original claim of liability as to Under-Secretary-General Gillian Sorenson was based on her failure to properly investigate Corrinet's defamation claims. Corrinet alleged a duty to properly investigate, which was breached when Sorenson simply dismissed out-of-hand all such claims, without even bothering to contact any of the witnesses. As such, Sorenson ratified the conduct of Ginns, and assisted Ginns in his overall efforts to defame Corrinet and to intentionally interfere with Corrinet's prospective economic advantage from the subject transaction. (Complaint, page 21.)

Respondents did not file an answer to petitioner's complaint. On November 22,1995, petitioner Corrinet moved for a default judgement. Shortly thereafter, respondents, through the legal department of the United Nations, submitted a letter to the Court, stating that the United Nations and its officers are immune from this suit and that Secretary Boutros Boutros Ghali would not waive the immunity. On December 1, 1995, petitioner filed an objection to the letter as an improper form of response.

The United States of America filed a "Statement of Interest" on April 11, 1996 and requested the District Court dismiss the entire complaint *sua sponte*, arguing that the Court did not have subject matter or personal jurisdiction over the respondents, based on diplomatic immunity. Petitioner filed his opposition to this Statement of Interest on May 10, 196, arguing that, under Section 20 of the Convention on Privileges and Immunities, the Secretary-General has an enforceable duty to waive the diplomatic immunities where, in his opinion, the immunity would impede the course of justice and cannot be waived without prejudice to the interests of the United Nations. Corrinet had agreed to waive all claims against the United Nations in exchange for a complete waiver of all immunities as to Ginns. (Complaint, page 17, paragraph 66.)

Petitioner also argued that a further basis that pierces any shield of immunity is based on the commercial activity exception to immunity set forth in the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. Section 1605(a)(2):

> "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case in which the action is based upon a commercial activity carried on in the United States by a foreign state. . ." (Complaint, paragraph 52.)

Petitioner submitted that the Interim Agreement project constituted a commercial activity and further objected to the United States' Statement of Interest based on conflict of interest and previous assistance of the United States Diplomatic Mission to United Nations to plaintiff and reiterates that issue here.

A United States' Statement of Recent Decision was filed on August 14, 1996. Judge Weigel's Memorandum of Order dismissing the complaint was issued on September 10, 1996 (Exhibit B). Judgement was entered on September 17, 1996. The trial court did not hold a hearing on the matter, despite petitioner's written request in his Response to Statement of Interest by the United States of America and Request for Oral Argument.

The trial court permitted Corrinet leave to file a new separate lawsuit against Ginns in his individual capacity only. Corrinet filed the new action on January 14, 1997.

Counsel retained by the United Nations for Ginns filed a motion to dismiss the complaint on March 14, 1997. Ginns argued that because all his conduct was in his official capacity he could not be held responsible as an individual. An opposition brief filed by Corrinet on May 2, 1997 included a series of detailed declarations by various witnesses in support of the opposition to the motion to dismiss. A reply brief was filed by counsel for Ginns on May 9, 1997. The trial court refused to hear oral arguments, dismissed the findings of the previous trial court, and granted the motion to dismiss the complaint on May 22, 1997, ruling that Ginns' conduct was official. Appeal taken from this decision was later dismissed.

A timely notice of appeal from Judge Weigel's judgement was filed by petitioner on October 9, 1996 in conformance with Rule 4(a) (4)(A) and Rule 4(a) (4)(E) of the Federal Rules of Appellate Procedure for the main portion of first District Court's decision (Exhibit A).

After petitioner's opening brief was filed, an Amicus Curiae brief was filed by the United States Attorney General's office on behalf of the United States of America on March 12, 1997 supporting the decision of the District Court's ruling. No brief was ever filed by the United Nations itself.

On August 28, 1997 the United States Court of Appeals for the Ninth District summarily affirmed the District Court's decision.

STANDARD OF REVIEW

In *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 706 (9th Cir. 1992), the Ninth Circuit set out the following standard of review on a claim of immunity (*Siderman*, 965 F.2d at 706):

> "As a threshold matter, therefore, a Court adjudicating a claim against a foreign state must determine whether the FSIA (Foreign Sovereign Immunities Act) provides subject matter jurisdiction over the claim (Citations omitted). The existence of subject matter jurisdiction under the FSIA is a question of law, subject to *de novo* review. Id. Where, as in the present case, a claim has been dismissed for lack of jurisdiction, we accept the allegations of the Complaint as true." *Gerritson v. de la Madrid Hurtado*, 819 F.2d 511, 513 (9th Cir. 1987).

This Court is respectfully requested to submit this matter to *de novo* review and to reverse on the basis of error.

REASONS FOR GRANTING THE WRIT

A. CORRINET HAS PLED A CLAIM FOR SPECIFIC PERFORMANCE OF THE DUTY TO WAIVE THE IMMUNITY.

An unenforceable duty is no duty at all; it is simply an

illusion. The core issue of the present appeal is whether there is an enforceable duty to waive a diplomatic immunity, under Section 20 of the Convention of Privileges and Immunities of the United Nations. The trial court ruled there was no such enforceable duty, stating that the secretary-General's duty to waive the immunity is discretionary, and that "Petitioner's attempt to transform this right into a mandatory duty as determined by a court is unavailing." The Court further stated that it "will not question the Secretary-General's opinion here." (District Court opinion, Exhibit B.)

The District Court's ruling was in error, and the issue is still ripe for *de novo* review. The case should be reversed to require specific performance of the duty and to require the Secretary-General to waive the immunity.

> "The Secretary General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can't be waived without prejudice to the interests of the United Nations. . ." Section 20 of the Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15 (1946), 21 U.S.T. 1418 (1970), T.I.A.S. No. 6900.

According to discussions between counsel for Corrinet and counsel for the United Nations, Corrinet's challenge to the duty of Secretary-General Boutros Boutros Ghali to waive the immunity presents a case of first impression. Corrinet had submitted this matter before the United States Supreme Court as an original proceeding under 28 U.S.C. Section 1251(b)(1) and Article 3, Section 2 of the United States Constitution. The Supreme Court denied Corrinet's motion for leave to proceed as an original proceeding, and did not reach the merits of any claims. See, *Corrinet v. Ghali*, 116 S.Ct. 694, 64 U.S.L.W. 2465 (1996).

Petitioner is making a common sense claim that if a person has a true affirmative and mandatory duty, and if they fail to obey that duty, that a victimized citizen such as Mr. Corrinet should have recourse through the courts in order to enforce that duty. There should be no illusory duty in the law of diplomatic immunity.

Further, the United Nations itself states in their November 28, 1995 "response" letter to Judge Weigel that:

> "in cases in which the United Nations or its officials may be a party and in which the privileges and immunities of the Organization or of its officials have not been waived by the Secretary-General, Article VIII, Section 29, of the UN Convention requires the UN to make 'provisions for the appropriate modes of settlement of . . . disputes of a private law character'. In late January and early February of 1995, the United Nations offered petitioner the opportunity to arbitrate his claims against the United Nations and the named defendants. However, petitioner refused that offer and, instead, chose to commence the above-referenced action in this court."

What the United Nations failed to tell the court was that while the organization agreed to waive its immunities in order to allow the arbitration to go ahead, they specifically refused to waive those same immunities for any damage award judgement that Mr. Corrinet might have received. Their statement about this issue came down to "trust us," which is exactly what got Mr. Corrinet into these problems in the first place. Had he accepted the binding arbitration and received a judgement, he would be in the exact same place he is today--trying to obtain legal recourse in spite of an assertion of diplomatic immunity--and without any judicial options left.

Despite numerous attempts by Mr. Corrinet's counsel, the United Nations refused to waive as to any damage award judgement and forced Mr. Corrinet to file his complaint to avoid failing to meet the statute of limitations.

The United Nations, and the U.S. Attorney General's office, rely heavily on the decision in *De Luca v. United Nations Organization, et al.*, 841 F.Supp. 531, 535 (S.D.N.Y. 1994), aff'd. 41 F.3d 1502, cert. denied, 115 S.Ct. 1429 (1995) in regards to the Court upholding the U.N.'s immunity and unwillingness to look into petitioner's assertions of bad faith and improper motive by respondents. Factually though, *De Luca* is completely different than

the present case. The *De Luca* case involved a United Nations employee seeking to overcome internal United Nations personnel policies and procedures through the inserting of the U.S. court system in spite of a clear method of internal U.N. alternative means at dispute resolution. The courts properly chose not to become involved in what was clearly an internal matter of the United Nations.

This fact pattern bears no resemblance to the current circumstances of petitioner's case, which involves a U.S. citizen being defamed and victimized by another U.S. citizen working as a yearly contract consultant (not an employee or official) for the United Nations. Further, no means exist to resolve this matter other than through the United States court system, since no internal U.N. procedures are applicable, and the U.N. refused to grant an immunity waiver for any arbitration awards judgement.

B. IT IS A CLEAR INJUSTICE TO PROHIBIT PETITIONER'S CLAIM.

Mr. Ginns was motivated by a personal vendetta, as described above, and as particularized in the complaint (Complaint, paragraphs 31-33), which had nothing to do with his United Nations activities. To allow Mr. Ginn's intentional conduct to go without remedy would work an injustice, which invokes the mandatory duty to waive immunity under Section 20 of the Convention on Privileges and Immunities.

To maintain the position that Ginns' false statements, made in direct contravention of the stated written position of the Secretary-General, and on a project that was not within the scope of his job duties, constitutes "official duties" is a travesty.

Further allowing petitioner's claim, as is required under Section 20 of the Convention on Privileges and Immunities, would not prejudice the interests of the United Nations. Mr. Corrinet has several times offered to hold the United Nations harmless and dismiss them from any and all claims, in exchange for a complete waiver of any immunity as to Mr. Ginns (Complaint, paragraph 66):

> "As to the lack of prejudice to the United Nations, Corrinet further specifically advised the United

> Nations, in his April 16, 1994 letter requesting a waiver, that at the very least, the immunity could be waived as to Ginns, in which case Corrinet would hold the United Nations harmless, and would pursue his remedies against Ginns as an individual only. In this respect, the United Nations would suffer no detriment or prejudice from any lawsuit brought against Ginns for defamation."

Under Section 20 of the Convention on Privileges and Immunities, the United Nations' diplomatic immunity must be waived by the Secretary-General if it will otherwise result in an injustice, and can be waived without prejudice to the interests of the United Nations. Petitioner-appellant submits that the District Court erred in failing to step in and correct the failure of Secretary-General Boutros Boutros Ghali to waive the immunity, and that the matter should be reversed and remanded with instructions to order specific performance of the duty to waive the immunity, and to require Secretary-General to waive Ginns' immunities.

The Supreme Court can now decide whether under the particulars of this case, there was a mandatory duty to waive the immunity. To hold that there is no enforcement mechanism would be to leave the Secretary-General of the United Nations with a duty which generally speaking is unenforceable. Such a duty would make a mockery out of the immunity and Section 20 of the Convention on Privileges and Immunities, and would make the express language requiring waiver more or less superfluous.

Or in the alternative to order the Secretary-General to comply with Article 8, Section 29 of the United Nations Convention on Privileges and Immunities, which states:

> "The United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; (b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General."

and enforce a reasonable means to settle this dispute and receive any damage award without further immunity impediments.

The Court should consider the following statements made in connection with passage of the privileges and immunities treaty legislation before the United States Senate, under its constitutional grant of authority to advise and consent to treaties. (The President has power "by and with the advice and consent of the Senate, to make treaties provided two-thirds of the senators present concur." U.S. Const., Art. II, Section 2):

(Comments by Ambassador Charles W. Yost, then U.S. Permanent Representative to the United Nations, concerning Section 14 of the Convention, which sets forth a similar duty as Section 20) United States Senate Committee on Foreign Relations, Senate Executive Report No. 91-17, page 9 (91st Congress, 2d Sess., March 17, 1970):

> "I would wish to point out that the Convention contains in Article 14, an express provision which states in relevant part: 'Privileges and immunities are accorded to the representatives not for . . . personal benefit . . . but in order to safeguard the independent exercise of their functions . . . consequently a member not only has the right, but is under a duty to waive the immunity of its representative in any case when, in the opinion of the member, the immunity would impede the course of justice . . .' This represents a greater obligation on sending states that exist with regard to diplomats in Washington, and is in my view an improvement over existing law and a significant safeguard against any abuse."

Similarly on point are statements made by Mr. John R. Stevenson, Legal Advisor to the Department of State, which were made to the Senate Committee on Foreign Affairs and are found at Sen. Ex. Rep. 91-17 (91st Con., March 9, 1970) at page 15:

> "Article VI grants experts on mission for the United Nations immunities only to the extent necessary for

> the exercise of their functions during the period of their mission. There will be few people covered by these provisions. The Convention stresses the Secretary General's duty to waive these immunities where failure to do so would impede the course of justice and waiver would be compatible with the work of the United Nations."

Under the circumstances, and given the legislative intent as evidenced by the above-quoted statements of Ambassador Yost and Mr. Stevenson, the Court of Appeals should hold that the District Court erred in dismissing Corrinet's first claim for equitable relief to enforce the mandatory duty to waive the immunity, as required under Section 20 of the Convention on Privileges and Immunities, or provide a reasonable alternative means of settlement of the private law action.

C. THE COMMERCIAL ACTIVITY EXCEPTION APPLIES.

A further basis to permit Corrinet's claims is found under the Foreign Sovereign Immunity Action (FSIA), 28 U.S.C. Section 1604, et seq., commercial activity exception to diplomatic immunity. See, 28 U.S.C. Section 1605(a)(2):

> "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case in which the action is based upon a commercial activity carried on in the United States foreign state . . ."

As pled in Corrinet's complaint (Complaint, paragraph 53):

> "The Corrinet project with respect to the interim agreement constitutes a commercial activity. The conduct of the defendants is in breach of the letter and spirit of the Reed Letter, and constitutes a basis for liability of each of the involved defendants and the United Nations for the conduct with respect to the subject commercial activity . . ."

Mr. Corrinet went to great lengths to verify, recheck, and finally to confirm in writing, the United Nations' interest in the project and final donation of the documents. He disclosed the entire project to the United Nations, sought out potential conflicts, and committed himself and his financial resources to the project only upon receiving the Secretary-General's written confirmation.

Petitioner Corrinet submits that the United Nations cannot provide an individual with permission to move ahead on a project, knowing that the individual is expending large sums of time and money to complete the project, and then allow a minor paid consultant (not even an officer or employee of the United Nations) to completely deny the express written intent of the Secretary-General of the United Nations and destroy the project.

The United Nations knew the extent of the funds and time involved in the project by petitioner. Further, they knew that petitioner's commitment to the project was related directly to the United Nations' written expression of support of the project. Without such a written commitment, the petitioner would never have become involved in the project.

Clearly, under the commercial activity exception, such conduct would constitute an exception to any immunity, and Corrinet would not be stopped from bringing an action at law to enforce the agreement, or for torts committed from the agreement. A transaction for historic papers is a commercial transaction and the United Nations was the integral part. Torts committed in connection with such activities are excepted from any immunity.

On this issue of whether the allegations of the factual circumstances of the Corrinet project regarding the interim agreement constitutes "commercial activity," the District Court held, in its Memorandum and Order dismissing the complaint (Exhibit B), that the transaction was not commercial because the transaction was not a purchase and no payment of any kind was involved. (Exhibit B, lines 23-24, and footnote 2, page 3, and lines 1-13, and footnote 3, page 4.)

The Court did not hold a hearing on this matter, and completely misinterpreted the nature of the transaction between

Corrinet and the United Nations. The beginning and end of the analysis is the letter by Under-Secretary-General Reed, dated September 11, 1992 (Complaint, page 5, paragraphs 26 and 28 and Exhibit C), which states that the United Nations would receive the document as a gift, and hold it for permanent display in the United Nations headquarters.

The Court thought the deal was merely to get the document authenticated. In its Memorandum and Order dismissing the complaint, Judge Weigel wrote, "The only thing that the petitioner was requesting from the United Nations was authentication of his documents, which was not a commercial transaction." (Exhibit B, page 4, lines 7-10.) The court was just plain wrong on this issue. The Reed letter (Exhibit C) shows there was obviously much more to this transaction than mere authentication. Under the proposed deal, the United Nations was to receive the documents for permanent display. The transaction involved a donation to the United Nations, including a transfer of title, so that the document would be permanently displayed at the United Nations for its millions of visitors from all over the world to view. This transaction was instrumental in obtaining a $3 million sale of the document to a private buyer, who would in turn donate it to the United Nations. (Complaint, pages 5-7.)

The transaction at hand invokes the commercial activities exception to sovereign immunity. Accordingly, the Court should reverse and remand with instructions to allow petitioner's defamation and other claims to proceed against Ginns.

D. IMMUNITY QUESTIONS RAISE ISSUES OF FACT WHICH REQUIRE A TRIAL.

> "Under the FSIA, we presume that actions taken by foreign states or their instrumentalities are sovereign acts, and thus are protected from the exercise of our jurisdiction, unless one of the FSIA's exceptions to immunity applies. (Citations omitted.) Once the plaintiff offers evidence that the FSIA exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply." *Joseph*

v. Office of Consular General of Nigeria, 830 F.2d 1018, 1021 (9th Cir. 1987).

The point of the above is that fundamentally, immunity questions create issues of fact which require a trial. See, *County of Westchester v. William Ranollo*, 67 N.Y.S. (2d) 31, 35. (State court proceeding against a United Nations chauffeur for the Secretary-General, charged with exceeding the speed limit, it was held that "upon the facts in this case, the defendant is not entitled to immunity as a matter of law . . .") Mr. Corrinet was, has, and continued to be prepared to come to trial to submit documentary and testamentary evidence supporting his claims that there are no immunities applicable to the present proceeding. However, neither the District Court nor the United States Court of Appeals for the Ninth District permitted an evidentiary hearing on the immunity issue. The District Court was in error in so not permitting the hearing, and this issue is ripe for review by the Supreme Court. The Court should reverse and remand for a trial on the merits of all immunity issues.

E. THE DISTRICT COURT COMMITTED A SERIES OF PROCEDURAL ERRORS REQUIRING REVERSAL.

The District Court committed a series of procedural errors requiring reversal. These errors include the following:

1) The District Court erred in failing to sustain petitioner's objection to the United Nations' letter brief. A letter brief is an improper method of responding to a complaint, and should have been stricken from the record. Petitioner filed an objection to the letter brief, which the trial court referenced at page 2 of its Memorandum and Order (Exhibit B). The trial court was in error in its refusal to sustain petitioner's objection.

2) The District Court erred in failing to sustain petitioner's objection to the Statement of Interest filed by the United States on April 11, 1996. In petitioner's response to the Statement of Interest, an objection to the position of the United States of America was made. The Court did not rule on this objection. The objection was based on the existence of a conflict of interest between United States of America and Corrinet. Corrinet had been receiving assistance on this matter through the office of then Ambassador Madeleine

Albright. Ambassador Albright's office was generally helpful in shepherding this matter through the United Nations. The United States had not taken a written position with respect to the merits of Mr. Corrinet's claims. Instead, the United States assisted Corrinet in determining a method to bring the matter before an appropriate tribunal, so that the merits could ultimately be decided upon by that tribunal.

Without warning, the United States suddenly turned on its own citizen, after first helping that citizen. This constitutes a conflict of interest, which should have precluded the continued presence and arguments of the United States in the proceedings before the District Court. In refusing to deal with this objection, the Court committed reversible error.

3) The District Court erred in failing to hold a hearing on the issue of the Court's own motion to dismiss. In Corrinet's response to the Statement of Interest by the United States, he made a written request to have oral argument on the issue of whether the complaint should be dismissed.

In the Court's Memorandum and Order (Exhibit B, page 2, footnote 1), the Court rationalized its refusal to allow a hearing. As noted above, the Court was thoroughly mistaken as to the nature of the transaction between Corrinet and the United Nations. The Court understood that the transaction was merely to authenticate the signature pages of the subject document. Nothing could be further from the truth, as was clearly evidenced by the Reed letter (Exhibit C). Corrinet points out this misunderstanding as a clear example of why a hearing should have been held. Corrinet could have clarified the intricacies of his transaction, as they are specified in Corrinet's complaint. (Complaint, pages 5-7.) Under the specific circumstances presented by this case, and in light of Corrinet's request for hearing, it was error and an abuse of the discretion for the Court to deny a hearing on the matter.

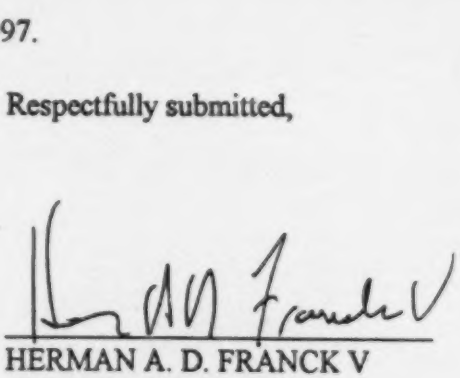
CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court should issue a writ of certiorari to the United States

Court of Appeals for the Ninth Circuit to review the decision below.

Dated: November 20, 1997.

Respectfully submitted,



HERMAN A. D. FRANCK V
FRANCK & ASSOCIATES

Attorney for Petitioner-Appellant
Mark Steven Corrinet

EXHIBIT A

Exh. 1a

EXHIBIT A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK CORRINET,

Plaintiff-Appellant,

v.

UNITED NATIONS, et al.,

Defendants-Appellees.

No. 96-17130
DC# CV-95-426-SAW
Northern California

United States Court of Appeals
Ninth Circuit

ORDER

Decided August 28, 1997

Before: SCHROEDER, FERNANDEZ and RYMER, Circuit Judges

A review of the record and appellant's opening brief indicates that the questions raised in this appeal are so insubstantial as not to need further argument. See *United States v. Hooton*, 693 F.2d 857 (9th Cir. 1982) (per curiam).

Accordingly, we summarily affirm the district court's judgment. All other pending motions are denied as moot.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

AFFIRMED.

EXHIBIT B

Exh. 1b

EXHIBIT B

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

MARK STEVEN CORRINET,

Plaintiff,

v.

UNITED NATIONS, HON. BOUTROS BOUTROS GHALI, GILLIAN SORENSON, and RON GINNS,

Defendants.

No. C-95-0426 SAW

In the United States District Court
for the Northern District of California

Decided September 16, 1996

MEMORANDUM AND ORDER

I. BACKGROUND

Plaintiff is a collector and dealer in historic documents, who claims to own the original signature pages of the United Nations Interim Agreement. He states that he has been trying to sell these pages, and is asking approximately three million dollars for them. In the course of this attempt, he contacted the United Nations in 1993-94 with the goal of having the pages authenticated.

Plaintiff alleges that Defendant Ron Ginns was appointed by Defendant Gillian Sorensen to assist her in the preparation for the 50th anniversary Charter Day, to occur during 1995. Plaintiff further contends that he and Defendant Ginns have had a long-standing feud. Plaintiff claims that because of this feud, Defendant Ginns defamed Plaintiff by stating that Plaintiff was a fraud, and that his documents were not authentic and were valueless. Plaintiff asserts that these

statements were false and that he has been injured by them both in reputation and by being unable to sell his documents.

Defendants, the United Nations and its officials, have not filed an answer to Plaintiff's complaint. Instead, Defendants submitted a letter to the Court (to which Plaintiff objected), stating that the United Nations and its officers are immune from this suit and will not waive this immunity. Plaintiff moves for a default judgment.

II. DISCUSSION

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a court may *sua sponte* raise a motion to dismiss for failure to state a claim upon which relief can be granted.[1] *Silverton v. Dep't of Treasury*, 644 F.2d 1341, 1345 (9th Cir. 1981); *Shockley v. Jones*, 823 F.2d 1068, 1072 (7th Cir. 1987) (*sua sponte* dismissal for failure to state a claim proper where a sufficient basis for the court's action appears from plaintiff's pleadings).

Defendants have not appeared in this case, but assert in a statement of interest filed pursuant to 28 U.S.C. Section 517 that their immunity from suit mandates dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

A. UNITED NATIONS

The United Nations has absolute immunity "from every form of legal process except insofar as in any particular case it has expressly waived its immunity." United Nations Convention art. II, Section 2. See also *Boimah v. United Nations General Assembly*, 664 F.Supp. 69, 71 (E.D.N.Y. 1987) (holding that absolute immunity of United States requires dismissal of complaint). The United

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1. Courts differ on whether notice and the opportunity for a hearing should be provided before dismissal on 12(b)(6) grounds. See *Shockley*, 823 F.2d at 1073 (dismissal under Rule 12(b)(6) without notice or a hearing is improper); *Smith v. Colorado Dep't of Corrections*, 23 F.3d 339, 340 (10th Cir. 1994) (*sua sponte* dismissal appropriate in the absence of notice and an opportunity to amend when amendment would be futile). Even in *Shockley*, however, the reviewing court declined to remand the action where notice and a hearing were not provided because it would be futile since the complaint failed as a matter of law. Accordingly, courts agree that where amendment would be futile, a district court may *sua sponte* dismiss with prejudice without giving the plaintiff notice or an opportunity for a hearing. In any event, while there has been no hearing in the present case, Plaintiff has had the opportunity to respond to Defendants' claims of immunity, and has done so in a 14-page document.

Nations has not waived its immunity, and Plaintiff does not assert otherwise.

Plaintiff claims, however, that the United Nations' immunity is lost because of the "commercial activity exception" embodied in 28 U.S.C. Section 1602, the Foreign Sovereign Immunities Act. Defendants, through the United States' Statement of Interest, argue that this exception does nothing to eviscerate the United Nations' independently established immunity granted by the United Nations Convention. The Court need not address this issue, however, because the transaction at issue was not commercial.[2]

Plaintiff argues that his alleged agreement with the United Nations for its eventual acquisition of his historic documents is analogous to a scenario whereby the United Nations would agree to purchase a piece of art from him. Plaintiff then argues that, because the latter is undeniably commercial in nature, so is the former. The "transaction" between the Plaintiff and the United Nations was not a purchase, however. The only thing that the Plaintiff was requesting from the United Nations was authentication of his documents, which was not a commercial transaction.[3] Plaintiff's intent that a third party eventually would donate these documents to the United Nations is irrelevant, and, in any event, is not a commercial transaction as far as the United Nations is concerned.

B. OTHER DEFENDANTS

Plaintiff also acknowledges that insofar as Defendant Boutros-Ghali, Defendant Sorensen, and Defendant Ginns were acting at all relevant times in their official capacities, they are immune from suit. Plaintiff claims, however, that an alternate theory of liability applies to Defendant Boutros-Ghali, and that Defendant Ginns was not acting in his official capacity when he allegedly defamed Plaintiff.

Plaintiff argues that Defendant Secretary-General Boutros-Ghali violated a mandatory duty to waive the United Nations

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2. Plaintiff's bare assertion that a commercial transaction is involved does not help him avoid dismissal. Plaintiff's complaint contains no facts indicating that the relationship between Plaintiff and the United Nations was commercial in any way.

3. Plaintiff nowhere contends that his request that the United Nations authenticate the signature pages was a commercial transaction, and no payment of any kind was involved.

Convention's grant of immunity for Plaintiff's suit. For support of this novel proposition, Plaintiff cites a section of the Convention, which reads "[t]he Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations." United Nations Convention art. V, Section 20 (emphasis added).

Plaintiff's attempts to transform this right into a mandatory duty as determined by a court is unavailing. For a court to look at the facts and find that the Secretary-General should have waived immunity would fly in the face of the express language of the Convention. The Secretary-General's opinion as to whether waiver is appropriate is the important issue, and this Court will not question the Secretary-General's opinion here. Indeed, absolute immunity would be worthless if courts were permitted to override the Secretary-General's decision as to whether that immunity should be waived.

Plaintiff also contends that Defendant Ginns was not acting in his official capacity when he allegedly defamed Plaintiff.[4] Plaintiff's complaint, however, asserts that Ginns "was at all times working within the scope and course of his status as an Official with the United Nations." Complaint, at 3, para. 16. Plaintiff cannot have it both ways.

The Court dismisses the suit in its entirety, but without prejudice as to Defendant Ginns, so that Plaintiff may refile his case as to Defendant Ginns if he chooses to pursue an individual action against him.

Accordingly, it is HEREBY ORDERED THAT Plaintiff's complaint is dismissed as to Defendants United Nations, the Honorable Boutros Boutros Ghali, and Gillian Sorenson with prejudice, and as to Defendant Ron Ginns without prejudice. Plaintiff's motion for a default judgment is DENIED.

Dated: September 10, 1996

/s/ Weigel
Judge

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4. To the extent that Defendant Ginns was acting in his official capacity, he is immune from suit. Designated United Nations officials are "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity." United Nations Convention art. V, Section 18(a). Plaintiff does not argue that Defendant Sorensen ever acted outside of her official capacity. As a result, Defendant Sorensen is immune from suit.

Exh. 5b

United States District Court
Northern District of California

MARK STEVEN CORRINET,

Plaintiff,

v.

UNITED NATIONS, HON. BOUTROS BOUTROS GHALI, GILLIAN SORENSON, and RON GINNS,

Defendants.

C 95-426 SAW

JUDGMENT

In accordance with the Memorandum and Order of September 10, 1996,

IT IS HEREBY ADJUDGED that plaintiff's complaint is dismissed as to defendants United Nations, the Honorable Boutros Boutros Ghali, and Gillian Sorenson with prejudice, and as to defendant Ron Ginns without prejudice. Plaintiff's motion for a default judgment is denied.

Dated: September 16, 1996

/s/ Weigel
Judge

EXHIBIT C

EXHIBIT C

Joseph Verner Reed
Under-Secretary-General
Special Representative
of the Secretary-General
for Public Affairs

September 11, 1992

Dear Dr. Farhat:

On behalf of the Secretary-General of the United Nations, I would like to confirm that we are most interested in receiving in donation the United States Department Backup copy of the Signature Pages of the United Nations Charter, dated June 26, 1945.

It is our understanding that this document is being donated to the UNA-SF, who will retain the document until 1995, at which point you wish to donate it to the United Nations during the Charter Days Celebrations in San Francisco, June 1995.

It is of course understood that the United Nations will require a formal letter of transfer of title, including a statement of the donor's right of legal title, at the time of donation. Also, while the documents provided seem to indicate that the signature pages are genuine, the United Nations reserves judgement and formal comment on the documents genuineness until we have inspected the originals ourselves. Subject to the above conditions, we would be delighted to accept this document in 1995.

With every good wish.

/s/ Joseph V. Reed

Dr. Laina Farhat
Executive Director
United Nations Association
of
San Francisco

CC: Mr. Sinha S. Basnayake
Director
General Legal Division